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IN THE

Supreme Court of the United States

No. 968

HOWARD D. YEAGER, Warden New Jersey State Prison at Trenton, New Jersey,

Petitioner,

v.

UNITED STATES OF AMERICA, *ex rel.*, HERBERT JAMES DALEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Third Circuit of August 11, 1969.

Opinion

The opinion of the United States Court of Appeals for the Third Circuit bearing Case No. 17,031 and dated August 11, 1969, is appended below.

Jurisdiction

This is a petition for a writ of certiorari to review an Order of the United States Court of Appeals for the

Third Circuit of August 11, 1969. A certified judgment in lieu of formal mandate was issued on September 8, 1969. This court has jurisdiction to review the order and judgment of the United States Court of Appeals for the Third Circuit by reason of 28 U. S. C. A. sec. 1254.

Questions Presented

1. Does the Sixth Amendment right to counsel apply to protect the Fourth Amendment right to be free from unreasonable searches and seizures; and, when demanded, must counsel be present when a consent to search one's home without a warrant is obtained, however voluntary and intelligent such consent is found to be in fact?

2. If so, did the defense adequately raise this issue at trial?

3. If so, did the defendant herein waive such right to counsel and merely request an attorney to represent him at a preliminary examination and at trial?

4. Did the defendant effectively waive his right to counsel with regard to the extrajudicial practices of the police by voluntarily cooperating and confessing to the crime prior to the preliminary hearing at which counsel was requested?

5. If the Sixth Amendment right to counsel does apply to protect one's Fourth Amendment rights and defendant did not waive same, still did such right to counsel in a pre-indictment context exist in the case of an April, 1964 trial?

6. And, even if it did, was not any violation of such right harmless in view of the fact that a voluntary con-

fession by the defendant was admitted into evidence, which confession was strongly corroborated by various circumstantial evidence?

Constitutional Provisions Involved

1. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." *United States Constitution,* Amendment No. 4.

2. "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ." *United States Constitution,* Amendment No. 5.

3. "In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defence." *United States Constitution,* Amendment No. 6.

4. ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws." *United States Constitution,* Amendment No. 14.

Statement of Case

Herbert James Daley was tried before a Union County, New Jersey jury from April 6th through April 24th, 1964, on a charge of murder. On May 14, 1964, after a finding of guilt of second degree murder, he was sentenced to 20 to 24 years of imprisonment. There were numerous, previous appeals in this matter. Direct appeal to the Supreme Court of New Jersey resulted in affirmance of the conviction. *State* v. *Daley,* 45 N. J. 68, 211

A. 2d 354 (1965). A petition for a writ of certiorari was denied by the United States Supreme Court in 384 U. S. 1022 (1966). Without exhausting his state remedy of post conviction relief, Mr. Daley thereafter filed a petition for a writ of habeas corpus in the United States District Court for the District of New Jersey on August 22, 1966. This petition was dismissed on October 30, 1967. At no time up to this point—neither in the trial court nor in any of the above reviewing tribunals—was the precise issue upon which the United States Court of Appeals subsequently acted raised or expressly adjudicated. The order of the District Court was appealed to the Third Circuit on November 6, 1967; and, as noted, on August 11, 1969, Mr. Daley's petition for a writ of habeas corpus was granted by order of the United States Court of Appeals for the Third Circuit.

The opinion of the Third Circuit, which is appended hereto, is essentially grounded on the theory that because Mr. Daley demanded counsel at a preliminary hearing it was thereafter unconstitutional for police officers to obtain his consent to search his apartment in the absence of an attorney. Subsidiary hypotheses of the opinion are: the defense adequately raised this issue at trial; the defendant did in fact make a demand for an attorney to represent him at such an early, out-of-court stage of the proceedings; such a pre-indictment right to counsel did apply to an April, 1964 trial; and there was no harmless error notwithstanding the fact that the police had obtained an entirely admissible confession prior to the alleged demand for counsel and there was other, strong circumstantial evidence.

[The following is substantially similar to the "Counter-Statement of Facts" contained in the "Answer of State of New Jersey to petition for writ of certiorari"

in the matter of *Herbert James Daley, petitioner, v. State of New Jersey, respondent,* No. 378, 378 Misc., October Term 1965. The same transcript citations are again utilized herein, and they are begun by the letter "S". Therefore most transcript citations made below may be substantiated by reference to the appendix to the answer filed by the State of New Jersey with regard to No. 378 Misc., October Term 1965. Facts not in said appendix shall appear below as a direct quotation from the trial transcript, set off by the letter "T".]

The investigation of the present matter commenced when the bruised and battered body of the victim, one Lillian Oskutis, was found lying in a pool of blood, at the rear of a beauty parlor at 257 Morris Avenue, Elizabeth, New Jersey, at approximately 6:30 A.M. on September 2, 1963 (S. 1a-3a). The primary cause of death was later determined to be subdural hematoma caused by a blow, or blows, to the head (S. 72a-74a).

The evidence disclosed that at approximately 1:00 A.M. on September 2, 1963, Mr. Daley and a companion, one Thomas White, arrived at the entrance to "Chuck Connor's Tavern," 245 Morris Avenue, Elizabeth, New Jersey (S. 12a-14a). At about the same time the victim, Lillian Oskutis, walked past the "Chuck Connor's Tavern" and past Mr. Daley and his companion west on Morris Avenue in the direction of the "Morris Avenue Bar and Grill." They followed her (S. 16a, 18a). White went into the "Morris Avenue Bar and Grill," but he soon came out (S. 25a, 256a-259a). Daley and White then commenced to return in the direction of the "Chuck Connor's Tavern" (S. 26a), at which time Daley noticed the victim standing on the sidewalk in front of the "Morris Avenue Bar and Grill." He walked back toward her while White remained standing on Morris Avenue somewhere

between the two taverns (S. 26a-27a). Daley and the victim spoke for a few minutes, and then he turned and walked toward White. The victim thereupon began screaming and using offensive language (S. 27a). She was then grabbed by Mr. Daley, who put his hand over her mouth, and dragged through the parking lot adjacent to the "Morris Avenue Bar and Grill" behind the beauty parlor where her body was subsequently found (S. 29a). White ran after Daley and witnessed this, but Daley chased him away. White remained on the sidewalk on Morris Avenue.

After a minute or two White again walked to the rear of the beauty parlor, from which area Daley emerged. White continued and found the victim lying on the ground, unconscious but still breathing (S. 30a-31a). White then left the area along with Daley; however, they soon parted and White did not again see Mr. Daley that morning.

Thereafter Mr. White returned to the rear of the beauty parlor and observed the body of the victim in the same position and still breathing. He picked up her pocketbook, which was open and the contents of which were spilled out. He put the contents back in the pocketbook and laid it next to the woman (S. 33a-34a). He left and did not again return (S. 36a-37a).

At 2:15 A.M. on the same September 2nd, 1963, one Edward Hausner and one Patrick Vahey were standing on the northeast corner of West Grand Street and Union Street, Elizabeth, New Jersey. At that time they observed Mr. Daley and he stopped and had a conversation with them. They observed that Daley's eye was injured, and there was blood on his shirt, but they saw no blood on his face. After a short conversation Daley left. About 20 minutes later they saw Mr. Daley return, this time

carrying his shirt rolled up. There was also blood on his undershirt (S. 45a-50a, 105a-109a).

At approximately 11:00 P.M. on the evening of September 2, 1963, Mr. Daley was arrested and transported to Elizabeth Police Headquarters (S. 53a, 54a, 77a). A physician was immediately summoned, and he examined Mr. Daley from about 11:50 P.M. until close to 1:00 A.M. on the morning of September 3rd (S. 57a, 79a, 94a). None of the defendant's injuries were found to be serious enough to require immediate medical attention (S. 95a to 99a).

Photographs were taken of Mr. Daley shortly after 12:00 P.M. (S. 79a). At about that time one of the detectives noticed what appeared to be bloodstains on Daley's shoes, and these were removed and preserved. A subsequent chemical examination of these shoes, which were worn by the defendant on the night that Lillian Oskutis was killed (S. 223a-224a), revealed that they were stained with human blood type O (S. 220a). The victim's blood was type O (S. 219a). That of the defendant was Type A (S. 128a-129a).

Before the taking of any written statement was commenced, Mr. Daley was confronted by his companion of the previous evening Thomas White, who identified him as the assailant of Lillian Oskutis (S. 87a). Shortly thereafter Daley admitted, "I did it," and agreed to give a written confession (S. 88a). The taking of the statement lasted from approximately 3:30 A.M. to about 5:30 A.M., September 3rd (S. 67a, 83a). Before this was begun, the detectives advised Mr. Daley that he wasn't compelled to speak (S. 67a-68a) and that anything he said could be used against him (S. 91a). He admitted this much on cross-examination (S. 119a-120a). During the period of questioning Daley admitted he was given

coffee 3 or 4 times, a ham and egg and sandwich, and all the cigarettes he wanted (S. 226a). Although Daley completed the 8th grade of school (S. 110a-111a), at the trial he contended he could not read or write and the trial judge refused to admit the written statement into evidence because it was not read to or by him (S. 159a). However, the trial court did hold the oral confession to be voluntary and admissible (S. 159a-177a). According to the oral confession, which was related to the jury, Mr. Daley admitted meeting the victim and beating her on the preceding evening. He stated that when she asked him for money and he refused, she grabbed his wallet and called him obscene names. He admitted pulling her into the parking lot and behind the beauty parlor, slapping, kicking and knocking her down. He left with Thomas White, but twice returned to the scene. He felt her pulse and slapped her again but he could not recall whether he kicked her or not. On the third occasion, he stated, he picked her up and she started fighting and scratching, and then she fell back and there was a pool of blood by her head. He stated he then went to the Penn Diner to clean up before returning home.

As indicated, the confession was completed at about 5:30 A.M. At 9:30 A.M. he was brought before the municipal magistrate who advised him of his constitutional rights and continued the hearing to a later date in order to permit him to obtain counsel. This was clearly done in compliance with New Jersey Criminal Practice Rule 3:2-3(b) which provided:

> "*Preliminary Hearing.* The magistrate shall inform the defendant of the complaint against him. . . . The magistrate shall also inform the defendant of

> his right to retain counsel or, if indigant, of the privilege of having counsel assigned, *and of his right to have a preliminary examination.* The magistrate shall allow the defendant reasonable time and opportunity to consult counsel. . . ." (Emphasis.)

It might be noted that a preliminary examination is a more formal, second stage proceeding following the preliminary hearing. At a preliminary examination an accused is represented by counsel, and has an opportunity to prevent referral of the matter to the grand jury if the State's proofs are not sufficiently strong. There is a right to cross-examination at the preliminary examination. Particularly in light of the fact that all of this took place before *Escobedo* v. *Illinois,* 378 U. S. 478 (June 1964) and even *Massiah* v. *United States,* 377 U. S. 201 (1964), it is clear that it was never understood that Mr. Daley was demanding counsel to represent him immediately, with regard to the out-of-court procedures of the Elizabeth Police Department. His demand was therefore not intentionally thwarted or frustrated by what followed the preliminary hearing. Moreover he did not misunderstand the magistrate, nor did he contemplate nor make a demand for immediate legal representation. At trial Daley testified that the magistrate asked him, "Do you want to make a plea now?", to which he replied, "I want to wait until I get a lawyer." The magistrate, according to Mr. Daley's testimony, then asked, "Can you afford a lawyer?" Daley then testified, "When I got off in—when I got over here [to the Union County Jail from the Elizabeth Municipal facilities] *I started to think,* where am I going to get the money for a lawyer." (Emphasis added.) Mr. Daley had enough money to

make a phone call; yet he made no call to anyone at any time (S. 116a). He didn't ask the magistrate if he could call a lawyer (S. 117a-118a). His first attempt to obtain legal assistance came later, on the second day he was at the Union County Jail (S. 118a).

Shortly before 11:00 A.M. on the morning of September 3, 1963, after Mr. Daley had finished with the magistrate, a detective went to his cell adjacent to the Elizabeth Municipal Court and asked him what clothes he had on during the early morning of September 2nd. He told the detective that the shirt he was wearing was in his room. The detective then asked him whether he could look in his room or go to his room and get the shirt and trousers that he was wearing. Daley thereupon replied, "Go ahead up there, the door is open, I never lock it." (S. 244a-245a). At that point Daley was removed to a detective's office (S. 245a-246a, 250a), where a "consent to search" form for Mr. Daley's apartment was typed (S. 44a, 246a, 292a). This form was explained to Daley—that it was a consent to search and it would give the officers the right to search his room for evidential articles in the case (S. 214a, 248a-252a). After having the form read to him, Daley was asked if he understood it. He replied, "Yes," and added, "I know you want to get some stuff out of my room. You will find some clothing on the closet floor." (S. 252a). Daley's signature was notarized (S. 248a, 252a, 254a). Before signing it Daley again indicated that he knew what the paper was and also that he knew he didn't have to sign it if he didn't want to (S. 233a-255a). The form read as follows:

> "I, Herbert Daley, having been informed of my constitutional right not to have a search made of the premises hereinafter mentioned without a search

warrant and of my right to refuse to consent to such a search, hereby authorize . . ."

From the room the detectives obtained a bloodstained dress shirt and undershirt that were admitted into evidence (S. 212a-218a). As with the shoes that were seized from Daley at police headquarters, a chemical analysis of these items *also* revealed that they were stained with human blood type O (S. 221a-222a).

It is abundantly clear, moreover, that the search of the apartment of Mr. Daley was attacked on *one* basis and one basis alone—that it was allegedly involuntary. *At no time was Sixth Amendment issue raised, nor so much as hinted.* Thus with respect to the motion to suppress the trial court found (at T. 1312):

> ". . . The Court believes that despite the fact that the defendant, in the language of the police officers, appeared nervous and his hand was shaking, was possessed of sufficient mental capacity and physical capacity to make a free and unequivocal and intelligent consent to search of his room by the Elizabeth Police officers.
>
> "The Court believes that the execution of the consent by the defendant, regarded, apparently from his own language, as not being necessary, he being willing to have the police officers go there without a consent, was merely a *further indication of the decision he had made earlier* to reveal to the police officers his involvement in the homicide: and that his conduct in the giving of the consent was merely a further consistent indication of the willingness to cooperate with the police officers and to permit them to obtain things which they might

regard as evidential of the acts which he had previously voluntarily admitted.

"The Court finds that the consent, as stated, was freely and intelligently given. Accordingly, the motion to suppress will be denied." (Emphasis added.)

Reasons for Granting the Writ

It is axiomatic that the granting of a petition for a writ of certiorari lies entirely within the discretion of the Court. *Denver* v. *New York Trust Co.*, 229 U. S. 123 (1913). However, it is submitted that this discretion should be exercised in the within matter for two reasons.

First, the Supreme Court of the United States has never spoken on the subject of whether the Sixth Amendment right to counsel applies to insure the protection of the Fourth Amendment right to be free from unreasonable searches and seizures, notwithstanding the voluntariness of a citizen's consent to search and notwithstanding the intelligence of the waiver of the right not to be searched. Is an objective-procedural approach of the type embodied in *Miranda* v. *Arizona*, 384 U. S. 436 (1966) going to be expanded into the area of the Fourth Amendment? If so, what should the precise practice be? What more should be required than a finding of fact that the waiver and consent to search was voluntarily, knowingly and intelligently made? Is a demand for counsel necessary? How are emergent situations, where evidence is vulnerable to destruction, to be handled? All of these questions, and more, remain very much open and create a huge area of ambiguity. The opinion of the United States Court of Appeals for the Third Circuit rests upon *White* v. *Maryland*, 373 U. S. 59 (1963); *Massiah* v.

United States, supra; and *Escobedo* v. *Illinois, supra.* However, these are not even close to being in point, as none deal with the Fourth Amendment. Until this time all that has been required in this area is that any consent to search be intelligent and voluntary in fact. *United States* v. *Mitchell,* 322 U. S. 56 (1943).

Secondly, assuming there is a right to counsel to prevent possible violations of one's Fourth Amendment rights, still the opinion of the Third Circuit was patently erroneous for a number of reasons. Certiorari must be granted to reverse these otherwise irrevocable errors, as the petitioner has no other recourse. These blatant errors include: (1) the failure of the Third Circuit to recognize that it was passing on an issue not raised in a timely fashion at trial and on which the trial judge was not given a fair opportunity to rule and trial counsel a fair opportunity to explore; (2) the Court's ignoring the apparent ["apparent" because trial counsel and the Court had no opportunity to amplify the record in this regard] fact that the defendant was not requesting an attorney to assist him in his immediate confrontations with the police officers, with whom he had previously decided to cooperate, and merely wanted a lawyer to represent him at future judicial proceedings; (3) the Court's retroactive application of *Escobedo* and kindred cases to this April, 1964 trial in violation of *Johnson* v. *New Jersey,* 384 U. S. 719 (1966); and (4) the Court's disregard of the fact that there was at most harmless error here, even if the articles of clothing were erroneously seized, under *Chapman* v. *California,* 386 U. S. 18 (1968), primarily due to the existence of the voluntary confession, the testimony of Thomas White and others, and the admission into evidence of the defendant's shoes for precisely the same purpose and effect as the challenged clothing.

CONCLUSION

For the above reasons it is respectfully submitted the within petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit be granted.

Respectfully submitted,

LEO KAPLOWITZ,
Union County Prosecutor,
By ARTHUR J. TIMINS,
Assistant Union County Prosecutor.

Dated: December 2, 1969

APPENDIX

Opinion of the United States Court of Appeals

(Filed—August 11, 1969.)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17,031

UNITED STATES OF AMERICA *ex rel.*
HERBERT JAMES DALEY,

Appellant,

v.

HOWARD D. YEAGER, Warden, New Jersey State Prison,
Trenton, New Jersey

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Submitted September 26, 1968

Argued May 1, 1969

Before BIGGS, FREEDMAN and VAN DUSEN, Circuit Judges

By VAN DUSEN, *Circuit Judge.*

Opinion of the United States Court of Appeals

This appeal challenges a District Court order denying a petition for a writ of habeas corpus. Relator (age 41 in 1963) was tried by a jury in the Superior Court of New Jersey, Union County, in April 1964 on a charge of murder. He was found guilty of murder in the second degree and sentenced on May 14, 1964, to a term of 20 to 24 years' imprisonment. On appeal to the Supreme Court of New Jersey, relator contended, inter alia, that the trial court should have excluded his oral admissions (recounted by police officers who had interrogated him) and suppressed evidence obtained by the police from his dwelling following his execution of a consent to search. Both the admissions and the consent, he urged, were involuntary and obtained in violation of his constitutional rights. The judgment of conviction and sentence were affirmed by the Supreme Court of New Jersey. *State* v. *Daley*, 45 N. J. 68, 211 A. 2d 354 (1965), cert. den. 384 U. S. 1022 (1966).

The victim, Lillian Oskutis, was found on a parking lot in Elizabeth, New Jersey, at about 5:30 A.M. on September 2, 1963. Her body showed marks of blood and violence, and she had been dead, according to the examining physician, for approximately two hours. Post-mortem examination revealed that she had been intoxicated and that death had been caused by blood clots resulting from injuries to the head (N. T. 309-313, 1340-1343).

Relator, it appears, had a casual acquaintanceship with the victim. Both regularly frequented the neighborhood taverns and relator had seen her "around." According to White, relator's companion during portions of the night of September 1-2 and the State's principal witness, Miss Oskutis walked past a certain tavern (having re-

cently departed from another bar) shortly after midnight.[1] Daley was standing outside the tavern and a brief conversation between him and Miss Oskutis ensued. Miss Oskutis became abusive and shouted profanely at Daley. Thereafter, according to White, Daley grabbed the victim and forcibly pushed her into the parking lot where she was ultimately found.

None of the State's witnesses, other than White, testified to having seen an assault upon the victim. The State did offer testimony that Daley had blood on his shirt in the early morning hours of September 2 when seen going to and from a diner (N. T. 251-2, 267, 517). It also appeared that Daley had been drinking steadily on September 1 (N. T. 64-65, 118); that he was involved in a barroom scuffle with one Roy that night (N. T. 57, 129-130); and that as a result he had suffered an eye injury or gash (N. T. 129, 228, 250-3, 517). The state also offered evidence that Daley's eye had not bled or had not bled sufficiently to account for the blood on his shirt.[2] (N. T. 57, 129, 228, 405).

The testimony indicates that Daley slept until afternoon on Sunday, September 1, and that he did not return home until after 5 A.M. Monday morning (September 2) (N. T. 554-5, 266-7). He was back in circulation—at a local tavern—by 8:30 A.M. on September 2 (N. T., 197),

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[1] White indicated that he too was only casually acquainted with the victim, although it appears that they lived in the same rooming house (N. T. 157; 1710-1713).

[2] One State's witness described the eye injury as a "very, very deep gash" and another of the State's witnesses testified that Daley's "face was all beaten up and his eye was pretty bad."

and he did not sleep again until after his arrest and interrogation, but he did lie down in an effort to sleep between about 11:30 A.M. and 2 P.M. See N. T. 568. Under such circumstances, he had had virtually no sleep (perhaps from 5 A.M. to 8:15 A.M. on September 2) from the afternoon of September 1 until the time he executed the consent to the search at about 11 A.M. on September 3 (a period of over 40 hours).

There is testimony that relator had a mental age of 11 in 1956 (N. T. 922) and of 10 in late 1963 (N. T. 921), according to tests given in those years. In 1956, Daley was admitted to the Marlboro State Hospital, a mental institution, for a period of 60 days (987). The hospital's director stated that the diagnosis had been "schizophrenic reaction simple type" (947) and the prognosis "poor" (951). He testified that a mental condition such as Daley had would be characterized by a greater degree of suggestibility (952) and that such a person's tolerance and will to resist would be lower in stressful situations (953).[3] The trial judge recited that "the defense offered considerable testimony as to the mental capacities or incapaci-

[3] This doctor testified at N. T. 953:

> "This man, as I indicated, is a simple schizophrenic with a dull normal to high moron intelligence. His ability to take harassment, distress, difficulty, solve problems, even simple problems, is very limited. . . . So in a stressful situation his tolerance would probably be lower than that of a normal person and to that degree his critical discernment to his judgment and will to resist would be impaired. That is not to say it would be totally impaired, but it would be relatively less than that of a normal person."

ties of the defendant";[4] which made it "apparent to the Court that the defendant was unable to read and was able to write merely his name and perhaps his address." (4a)

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[4] This language and the wording at R. 27a that "the oral statements . . . were the result of the free and unconstrained choice of the defendant and not as a result of the overbearing of his will by mental . . . coercion" negative the contention of counsel for relator (page 14 of Supplemental Brief) that the trial judge's determination of voluntariness (see page 11 below) contained "no reference to the mental condition or capacity of the accused." Also, the trial judge showed his consideration of the relator's mental capacity by his instructions to the jury on April 24, when he announced to it that the court "has decided to permit testimony concerning any alleged oral statements of the defendant allegedly made to certain police officers during the morning of September 3, 1963." (N. T. 1202) At that time he said:

> "It is your obligation to decide whether or not any of these alleged oral statements of the defendant were voluntary or involuntary and if you decide that any such alleged oral statement was involuntary you must disregard it or them entirely.
>
> "Now, in the course of presenting evidence in your presence to aid you in making a determination as to whether any alleged statement of the defendant was voluntary or involuntary, the defense has presented considerable testimony in evidence relating to the defendant's early childhood, his schooling and life in general, including his employment and work record, his school record, and testimany both lay and expert concerning his *mental capacity or mental incapacity.* This evidence is relevant and evidential. Not only in your determination of the issue of voluntariness or involuntariness of any alleged oral statement, but is also evidential and probative in several other respects in the case." [Emphasis supplied.] (N. T. 1202-03)

The balance of the case against Daley comes from two sources: (1) testimony by police officers as to admissions allegedly made by Daley while he was interrogated between 11:30 P.M. on September 2 and 5:30 A.M. on September 3,[5] (2) proof that clothing seized at Daley's dwelling pursuant to the consent to search was blood-stained, and that the blood on such clothing, as well as on his shoes (see page below), corresponded to the victim's blood type and not to Daley's.

During the trial, the trial judge concluded, in a statement from the bench, after a hearing conducted in the presence of the jury, that the oral admissions of Daley were voluntarily given (N. T. 1153-1177, R. 3a-R. 27a), and that he consented "freely and intelligently" (N. T. 1312 and R. 40a) to the search of his room and the seizure of his clothing, thereby waiving his Fourth Amendment rights (N. T. 1300-1312, R. 28a-R. 40a). In these bench statements, the trial judge found that the relator arrived at Police Headquarters at 11:30 P.M. on Septem-

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[5] A summary of the admissions of Daley appears in *State* v. *Daley, supra,* at pp. 355-56 of 211 A. 2d.

Daley testified, after his oral admissions had been read into evidence, that White proceeded to carry the victim, over his shoulder, into the parking lot; that he (Daley) told White "to leave her alone"; that he and White left the lot—at which point the victim was "all right" and that he returned later; that, when he returned, Miss Oskutis was lying in a different position, her dress was "up in the air" and her head was bleeding; that White was on the scene, standing about Miss Oskutis and "between her legs"; that he (Daley) attempted to help the victim by lifting her up and that he got blood on his shirt. See N. T. 1408-1413, 1418-1420.

ber 2, 1963, and was permitted to go to the men's lavatory. His left wrist was then handcuffed to a chair in the office of Detective Captain Brugger and his shoes, which had blood on them, were removed (493). After an examination by the police physician lasting about one hour, he "was found by the physician [to be suffering from an injury to his left eye and] to have numerous other abrasions and contused areas about his body. . . . [H]e did not in any respect require immediate medical attention. . . . if any pain was suffered, it was very slight, not severe, that the condition of the left eye was merely a matter of irritation and it was not severe." (N. T. 1163-64, R. 13a-14a). The defendant "was furnished with coffee [and sandwiches at times], permitted to smoke cigarettes whenever he desired" (N. T. 1165, R. 15a).

> "Preceding the beginning of the so-called written transript of the defendant's remarks, the defendant was also taken from Captain Brugger's office on one occasion to confront or be confronted with a material witness named Thomas White and this occurred sometime between 2:15 a.m. and 3 a.m. on the morning of September 3, 1963. After this confrontment, the defendant was returned to the office of Detective Captain Brugger and the interrogation continued. It was only a short time after the confrontation that, as Captain Brugger testiged, the defendant stated, 'I did it, I will give you a statement.'" (N. T. 1166, R. 16a).

> "[T]he defendant exhibited a desire to wait until the morning to give his statement . . . ." (N. T. 1167 and R. 17a).

". . . subsequent to 5:45 a.m. on the morning of September 3, 1963 . . . the defendant was taken from the Detective Bureau on the third floor of Elizabeth Police Headquarters to a cell on a lower floor of that building. He was placed in and remained in said cell from approximately 5:45 a.m. until approximately 9:30 a.m.

"The defendant testifies that he was unable to sleep while in the cell for that period of some three hours and forty-five minutes because, and it is a fact, his eye was, in his language, 'running and running and running.' In addition he complained that his back bothered him and the hardness of the sleeping facilities in the cell made it impossible for him to sleep during that period. This is not corroborated by any other witness but it is not contradicted by any witness.

"The defendant was removed from the cell at approximately 9:30 a.m. and apparently afforded a preliminary hearing by the municipal magistrate of the City of Elizabeth. In the course of the preliminary hearing the defendant was advised of his right to counsel to assist him, and in response to questions by the court, indicated a desire to obtain counsel. The magistrate, accordingly, continued the hearing until a later date and the defendant was . . . taken to . . . his cell in the lower portion of the Elizabeth Police Headquarters and remained there doing, I know not what, until approximately 11 a.m. . . . Detectives Schlauch and Lynes of the Elizabeth Police Department went to the cell of the defendant and, in the language of Detective

> Schlauch, the defendant was asked what clothes he was wearing on the night of September 1st and the early morning of September 2nd, 1963. The defendant said that the shirt he was wearing was in his room and he did not recall which pair of trousers he was wearing because he has five or six pairs that look almost alike. He was then asked by Detective Schlauch whether the detective could look in his room or go to his room and get the shirt and trousers that he was wearing on the night of September 1st, the morning of September 2nd, 1963. The defendant, according to Detective Schlauch, responded by saying, 'Go ahead up there, the door is open. I never lock it.' The defendant was then advised that the detectives, nevertheless, would like to have him execute a written consent to go to his room and there obtain the clothing that he was wearing on the night of September 1st or the early morning hours of September 2nd, 1963. The defendant was then taken to an upper room, I believe in the Detective Bureau again, where a written form of consent was prepared by Detective Schlauch." (N. T. 1301-1304, R. 29a-32a).

The consent form was read to relator, who "was told . . . that he didn't have to sign it if he didn't want to. The defendant responded, 'I will sign it.' The defendant thereafter signed the written consent. . . ." (N. T. 1306, R. 34a).

> "The Court believes that despite the fact the defendant in the language of the police officers, appeared nervous and his hand was shaking, was

possessed of sufficient mental capacity and physical capacity to make a free and unequivocal and intelligent consent to the search of his room by the Elizabeth police officers.

* * *

'The Court finds that the consent, as stated, was freely and intelligently given. Accordingly, the motion to suppress will be denied." (N. T. 1312, R. 40a).

After a careful consideration of this record, we have concluded that the relator's rights under the Fourth, Fifth and Sixth Amendments were denied since "right after" (pp. 138, 154 of C-2 in C. 847-66) the preliminary hearing on the complaint of murder, at which he requested the assistance of a lawyer (pp. 140-41, 228-9 of C-2 in C. 847-66) and which hearing was adjourned "until such time as he would have an attorney" (p. 140 of C-2 in C. 847-66),[6] the detectives (fully aware of his request for counsel) secured from him a consent to search his apartment and seized his blood-stained clothes, which were received in evidence at the trial in spite of a timely motion to suppress this evidence. See *White* v. *Maryland*, 373 U. S. 59 (1963); *Massiah* v. *United States*, 377 U. S.

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[6] New Jersey Criminal Practice Rule 3:2-3 provides in part:

"(b) Preliminary Hearing. The magistrate shall inform the defendant of the complaint against him and if a copy of the complaint has not previously been furnished to the defendant, he shall be supplied with a copy thereof. The magistrate shall also inform the defendant of his right to retain counsel or, if indigent, of the privilige of having counsel assigned, and of his right to have a preliminary examination. The magistrate shall allow the defendant reasonable time and opportunity to consult counsel. . . ."

201, 204-07 (1964).[7] Once the prosecution has commenced, law enforcement officers may not secure concessions from an accused which circumvent the protections a lawyer might provide. Cf. *Escobedo* v. *Illinois*, 378 U. S. 478 (1964),[8] where the court said at pp. 485-88:

> "The interrogation here was conducted before petitioner was formally indicted. But in the context of this case, that fact should make no difference. When petitioner requested . . . an opportunity to consult with his lawyer, the investigation had ceased to be a general investigation of 'an unsolved crime.' . . . The 'guiding hand of counsel' was essential to advise petitioner of his rights in this delicate situation. *Powell* v. *Alabama*, 287 U. S. 45, 69. This was the 'stage when legal aid and advice' were most critical to petitioner. *Mas-*

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[7] As stated in *People* v. *Rodriquez*, 11 N. Y. 2d 279, 183 N. E. 2d 651 (1962), cited with approval in *Massiah, supra*, at 205 (footnote 5),

> "It matters not that defendant gave his statement before indictment. It is the interrogation in the absence of counsel, after the criminal proceeding has been commenced, whether by grand jury indictment or by a charge placed before a magistrate following an arrest, which is forbidden."

In *United States ex rel. O'Connor* v. *State of New Jersey*, 405 F. 2d 632 (3rd Cir. 1969), we held that *Massiah* applies to state prosecutions pending direct appeal on and after May 18, 1964.

[8] We have not overlooked the rule that the *Escobedo* holding is inapplicable to this April 1964 trial. See *Johnson* v. *New Jersey*, 384 U. S. 719 (1966); *O'Connor, supra*, at footnote 7, p. 634 of 405 F. 2d.

siah v. *United States, supra,* at 204. It was a stage surely as critical as was the arraignment in *Hamilton* v. *Alabama,* 368 U. S. 52, and the preliminary hearing in *White* v. *Maryland,* 373 U. S. 59. What happened at this interrogation could certainly 'affect the whole trial,' *Hamilton* v. *Alabama, supra,* at 54, since rights 'may be as irretrievably lost, if not then and there asserted, as they are when an accused represented by counsel waives a right for strategic purposes.' *Ibid.* It would exalt form over substance to make the right to counsel, under these circumstances, depend on whether at the time of the interrogation, the authorities had secured a formal indictment. Petitioner had, for all practical purposes, already been charged with murder.

* * *

"There is necessarily a direct relationship between the importance of a stage to the police in their quest for a confession and the criticalness of that stage to the accused in his need for legal advice. Our Constitution, unlike some others, strikes the balance in favor of the right of the accused to be advised by his lawyer of his privilege[s] . . . ."[9]

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[9] The court also said at page 490:

"We have also learned the companion lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to *fear* that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system."

The Circuit Courts of Appeals have held that where a judicial proceeding has been adjourned to enable the accused to secure counsel, the Sixth Amendment precludes securing confessions from the accused in the absence of counsel. *Queen* v. *United States,* 335 F. 2d 297 (D. C. Cir. 1964); *Ricks* v. *United States,* 334 F. 2d 964, 969-70 (D. C. Cir. 1964). See, also, *Clifton* v. *United States,* 341 F. 2d 649 (5th Cir. 1965).

In view of the absence of "overwhelming" untainted evidence for the prosecution here, see *Harrington* v. *California,* —— U. S. ——, 37 L. W. 4772, 4773 (6/2/69), and of the weakened condition of relator from loss of sleep and his history of schizophrenia involving a tendency to suggestion and lack of critical discernment,[10] this record does not justify a finding that the deprivation of relator's constitutional right to a lawyer was harmless beyond a reasonable doubt.[11] See *Chapman* v. *California,* 386 U. S. 18 (1967); *O'Connor, supra,* at 638.

A careful review of the record shows that there is substantial evidence to fairly support the findings and

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[10] See page 4, *supra.*

[11] Armed with the improperly obtained consent to search, the police proceeded to relator's dwelling and seized several articles of clothing, including a shirt and undershirt. These latter items, as well as the shoes which had been removed from relator in the police station, were introduced into evidence at trial by the State. All bore bloodstains which, according to expert testimony, were Type O (N. T. 1345-47). The victim's blood type was also O (N. T. 1344); relator's was A (N. T. 993). The State introduced testimony of witnesses who observed relator wearing a bloodstained shirt in the early morning hours of September 2, 1963, approximately the time the death of the victim occurred.

conclusions of the state trial judge that the oral confession of relator made to the police officers about 3 A.M. on September 3 (see p. 6 above) was voluntary.[12] Under the standards in 28 U. S. C. § 2254(d), this determination after a hearing on the merits is "presumed to be correct." Pursuant to the June 2, 1969, opinion of the Supreme Court of the United States in *Jenkins* v. *Delaware* (No. 748, Oct. Term 1969—37 L. W. 4458), this oral confession received in evidence at the April 1964 trial will not be excludable, for failure to comply with the standards for determining admissibility of in custody statements set forth in *Miranda* v. *Arizona*, 384 U. S. 436 (1966), at the new trial required because of the denial of relator's constitutional rights in receiving his clothing in

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[12] See R. 3a to 27a. In making his findings, the state trial judge showed by his language (R. 10a to 11a) and his reliance (A. 10a & 24a) on cases such as *Rogers* v. *Richmond*, 365 U. S. 534, 541 & 544 (1961), that his attention was "focused . . . on the question whether the behavior of the State's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined . . ." (p. 544 of 365 U. S.). See, generally, *Developments in the Law—Confessions*, 79 Harv. L. Rev. 935, 961-984 (1966); cf. *Haynes* v. *Washington*, 373 U. S. 503, 513-15 (1963). Also, the trial judge "resolved the question of credibility [on issues such as whether relator requested counsel during the interrogation which included his oral confession] in favor of . . . the police witnesses [who stated] that the defendant never requested permission to communicate with . . . any . . . attorney . . ." (R. 22a; see, also, R. 21a). In view of this finding, *Escobedo* v. *Illinois*, 378 U. S. 478 (1964), would not render his oral confessions inadmissible in any event. See *Billingsley* v. *State of New Jersey*, 408 F. 2d 1181, 1183 (3rd Cir. 1969); cf. *Frazier* v. *Cupp*, 394 U. S. 731, 739 (1969).

evidence. We do not, of course, now determine whether the oral confession should be held admissible at the new trial, for we cannot now tell what evidence may be presented at that time on its voluntariness.

The order of the District Court will be reversed, with directions that an order be entered providing that a writ of habeas corpus shall be granted unless relator is granted, within a reasonable time, a new trial on terms not inconsistent with this opinion.

Order of the United States Court of Appeals Granting Certificate of Probable Cause, etc.

(Filed—December 14, 1967)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17031
C.A. MISC. REC. No. 839

UNITED STATES OF AMERICA *ex rel.*
HERBERT JAMES DALEY,

Petitioner,

v.

HOWARD D. YEAGER, Warden, New Jersey State Prison,
Trenton, New Jersey

(CIVIL No. 847-66)

Present:

HASTIE, FREEDMAN and VAN DUSEN,

Circuit Judges

Upon consideration of Petitioner's application for certificate of probable cause, for leave to proceed on appeal in forma pauperis and for appointment of counsel, and the lack of opposition thereto, all in the above-entitled case,

It is ORDERED that petitioner be and hereby is granted certificate of probable cause; and

Order of the United States Court of Appeals Granting Certificate of Probable Cause, etc.,

It is Further Ordered that petitioner be and hereby is granted leave to prosecute his appeal without prepayment of fees and costs or giving security therefor, to file typewritten briefs and to dispense with filing an appendix to his brief; and

It is Further Ordered that petitioner's motion for appointment of counsel be and hereby is denied.

By the Court,

William H. Hastie
Circuit Judge

State's Notice of Motion to File Respondent's Brief and Appendix Out of Time

(Filed—July 3, 1968.)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DOCKET No. 17,031

UNITED STATES OF AMERICA *ex rel.*
HERBERT JAMES DALEY,

Appellant,

v.

HOWARD D. YEAGER, Warden, New Jersey State Prison,
Trenton, New Jersey

Respondent.

(Civil No. 847-66)

To: HERBERT JAMES DALY, No. 415861
The New Jersey State Prison Farm
Lock Bag, R.
Rahway, New Jersey

Please take notice the undersigned, Attorney for Respondent, hereby moves the Court for leave to file its answering brief and appendix out of time.

Annexed hereto is the affidavit of Leslie P. Glick, Assistant Prosecutor in support of this motion.

State's Notice of Motion to File Respondent's Brief and Appendix Out of Time

LEO KAPLOWITZ
Union County Prosecutor
By: LESLIE P. GLICK
Assistant Prosecutor

APPROVED:

WILLIAM H. HASTIE
Chief Judge

July 16, 1968

Affidavit of Leslie P. Glick in Support of State's Motion

STATE OF NEW JERSEY, }
COUNTY OF UNION, } ss.:

LESLIE P. GLICK, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am Assistant Prosecutor to Leo Kaplowitz, Union County Prosecutor, State of New Jersey.

2. The duty of preparing Respondent's Brief and Appendix was assigned to me on June 6, 1968. On said date, our Office received a letter dated June 4, 1968 written by Richard M. Cherry, Staff Law Clerk of the United States Court of Appeals for the Third Circuit, who advised that the appellee's brief was due February 29, 1968.

3. I immediately obtained our Office file containing the papers relevant to the above appeal. I found that a copy of the appellant's brief was received in our Office on January 19, 1968, but that one of the clerk's in the Office placed the brief in file without bringing it to the attention of either the Prosecutor or any of the Assistant Prosecutors in the Office. Neither the Prosecutor nor any of the Assistant Prosecutors were aware that the appellant's brief had been served upon our office. As a result, the answering brief was not prepared until the matter was brought to our attention by the aforesaid letter.

4. Deponent makes this affidavit in support of a motion for an order permitting Respondent to serve and file its answering brief and appendix out of time.

LESLIE P. GLICK
Assistant Prosecutor

(Sworn to July 1, 1968.)

Consent of Appellant to State's Motion

(Filed—July 8, 1968.)

To: Leslie P. Glick, Esq.
Assistant Prosecutor
Union County Prosecutor's Office
Elizabeth, New Jersey

Herbert James Daley, the appellant, does hereby waive his right to oppose the Respondnet's Motion to file his Brief and Appendix out of time.

The waiver made heretofore is made based upon the affidavit which has been submitted by the representative of the respondent in support of his plea to be permitted to file out of time.

The appellant reserves all other rights and privileges available to him pursuant to the Laws and Rules governing the United States Court of Appeals for The Third Circuit.

Respectfully submitted

Herbert James Daley, *pro se.*

Dated: this 5th day of July, 1968.

Order Permitting Filing of Appellant's Brief, etc.

(Filed—January 30, 1968)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17,031

UNITED STATES OF AMERICA *ex rel.*
HERBERT JAMES DALEY,

Appellant,

vs.

HOWARD D. YEAGER, Warden, New Jersey State Prison,
Trenton, New Jersey.

Present:

HASTIE, *Chief Judge,* and
VAN DUSEN, *Circuit Judge.*

It is ORDERED that brief for appellant in excess of fifty pages to fifty-three pages be filed out of time as of the date of this order.

By the Court,
WILLIAM H. HASTIE
Chief Judge

Dated: Jan. 30, 1968

Order Appointing Counsel for Appellant, etc.

(Filed—January 2, 1969)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17,031

UNITED STATES OF AMERICA *ex rel.*
HERBERT JAMES DALEY,

Appellant,

vs.

HOWARD D. YEAGER, Warden, New Jersey State Prison,
Trenton, New Jersey.

Present:

BIGGS, FREEDMAN and VAN DUSEN,
Circuit Judges.

After consideration of the above-entitled case which was submitted on briefs to the above panel of this Court on September 26, 1968,

It is ORDERED that the following member of the Bar be and hereby is appointed as counsel for appellant in this civil case:

Order Appointing Counsel for Appellant, etc.

Professor Ralph Spritzer
University of Pennsylvania Law School
3400 Chestnut Street
Philadelphia, Pa. 19104
Telephone: 594-5638

It is Further Ordered that counsel for appellant is granted leave to file and serve a supplemental brief in legible typewritten form on or before February 19, 1969; counsel for appellee is granted leave to file and serve a supplemental brief on or before March 5, 1969; and counsel for appellant is granted leave to file and serve supplemental reply brief in typewritten for, if he so desires, on or before March 14, 1969; and

It is Further Ordered that the Clerk of this Court list this case for argument before the original panel at a time to be set at the convenience of said panel.

By the Court,
Freedman
Circuit Judge

Dated: January 2, 1968

Judgment of the United States Court of Appeals

(Filed—September 8, 1969)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17,031

UNITED STATES OF AMERICA, *ex rel.*
HERBERT JAMES DALEY,

Appellant,

HOWARD D. YEAGER, Warden, New Jersey State Prison,
Trenton, New Jersey.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE ..... DISTRICT OF NEW JERSEY

Present:

BIGGS, FREEDMAN AND VAN DUSEN,
Circuit Judges.

This cause came on to be heard on the record from the United States District Court for the ..... District of New Jersey and was submitted on briefs on September 26, 1968, and later argued by counsel on May 1, 1969.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Dis-

trict Court, filed October 30, 1967, be, and the same is hereby reversed, with directions that an order be entered providing that a writ of habeas corpus shall be granted unless relator is granted, within a reasonable time, a new trial on terms not inconsistent with the opinion of this Court. Costs taxed in favor of Appellant.

ATTEST:

THOMAS F. QUINN
Clerk

August 11, 1969

Docket Entries

GENERAL DOCKET

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case No. 17,031

DATE	FILINGS—PROCCEDINGS
1967	
Dec. 14	—[Transferred from Misc, Record No. 839].
	Order(*Hastie,* Freedman and Van Dusen, Circuit Judges) granting plaintiff-petitioner certificate of probable cause, granting petitioner-appellant leave to prosecute his appeal without prepayment of fees and costs or giving security therefor, to file typewritten briefs and to dispense with filing an appendix to his brief, and denying motion for appointment of counsel, filed. (dated November 29, 1967).
	Certified copy of above order to Clerk of District Court on November 29, 1967.
	Copy of Notice of Appeal, rec'd December 1, 1967, filed.
	Record, rec'd December 1, 1967, filed.
1968	
Jan. 30	—Order (*Hastie*, Chief Judge and Van Dusen, Circuit Judges) directing that brief for appellant (in excess of 50 pages to 53 pages) be filed out of time as of the date of this order, filed.

Docket Entries

Date	Filings—Proccedings
Jan. 30	Brief for appellant, rec'd January 19, 1968, filed. (4 typed copies). Proof of service in letter of January 16, 1968.
July 3	Motion by appellee for leave to file brief and appendix out of time with proof of mailing attached, filed. (4 copies).
July 8	Answer to respondent's notice and motion to file his brief out of time advising he waives his right to oppose appellee's motion, filed. (5 copies).
July 16	Consent motion approved. (*Hastie,* Chief Judge).
July 16	Brief and appendix for appellee, rec'd July 16, 1968, filed. (20 copies).
July 16	Affidavit of mailing on July 2, 1968 of above brief and appendix, rec'd July 3, 1968, filed.
July 31	Reply brief for appellant, filed. (4 copies). Proof of service in letter dated July 26, 1968.
Sept. 26	Submitted on briefs. Coram: Biggs, Freedman and Van Dusen, Circuit Judges.
Oct. 9	First supplemental record (Papers No. C-1 to C-3), filed. (Exhibit Room)
1969	
Jan. 2	Order (Biggs, Freedman and Van Dusen, Circuit Judges) appointing Professor Ralph Spritzer, University of Pennsylvania Law School, 3400 Chestnut Street, Phila., Pa. 19104

to represent appellant in this civil case; and granting counsel for appellant leave to file and serve a supplemental brief in legible typewritten form on or before February 19, 1969; granting counsel for appellee leave to file and serve a supplemental brief on or before March 5, 1969; and counsel for appellant leave to file and serve supplemental reply brief in typewritten form, if he so desires, on or before March 14, 1969; and directing the Clerk of this Court list this case for argument before the original panel at a time to be set at the convenience of said panel, filed.

Feb. 24—Acknowledgment by counsel for appellee of appellant's Supplemental Brief on February 20, 1969, filed.

Feb. 19—Supplemental Brief for Appellant, filed.

May 1—Argued. Coram: Biggs, Freedman and Van Dusen, Circuit Judges.

Aug. 11—Opinion of the Court (Biggs, Freedman and *Van Dusen*, Circuit Judges), filed.

Aug. 11—Judgment reversing the judgment of the District Court filed October 30, 1967, on directions that an order be entered providing that a writ of habeas corpus shall be granted unless relator is granted, within a reasonable time, a new trial on terms not inconsistent with the opinion of this Court. Costs taxed in favor of appellant, filed.

Certification

Sept. 8—Certified Judgment in lieu of formal mandate issued.

Sept. 8—Record returned to Clerk of District Court.

Sept. 12—Receipt for record rec'd from Clerk of District Court, filed.

Sept. 17—Exhibits returned to Clerk of District Court.

Certification

I, THOMAS F. QUINN, Clerk of the United States Court of Appeals for the Third Circuit, DO HEREBY CERTIFY the foregoing to be a true and faithful copy of the original appendix and proceedings in this Court in the case of U.S.A. ex rel. Herbert James Daley, Appellant vs. Howard D. Yeager, etc., *No. 17,031* on file, and now remaining among the records of the said Court, in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 8th day of October, 1969.

THOMAS F. QUINN,
Clerk of the U. S. Court of Appeals,
Third Circuit.